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Before the
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In the Matter of Reexamination of the Policy Statement on Comparative Broadcast Hearings	GC Docket No. 92-52

SUPPLEMENTAL COMMENTS
OF THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS

The League of United Latin American Citizens (LULAC), by its attorneys, hereby files supplemental comments in the above captioned proceeding. LULAC will also join in comments to be filed by a group of civil rights organizations. LULAC generally supports what it understands those comments will say. It adds here, however, some further observations and a few qualifications to those comments.

LULAC is the oldest and largest organization in the United States dedicated to advancing civil rights for Hispanics and other Americans of Latin origin. Founded sixty-five years ago, LULAC seeks to promote not only civil rights, but the educational, economic and social well being of Hispanics and other Latins throughout the United States.

LULAC believes that the Commission's comparative process continues to be vitally important. Minorities, and Hispanics in particular, are now woefully underrepresented among the nation's broadcast station owners. Hispanics constituted nine percent of the nation's population in the 1990 census, and that figure has

been rapidly growing. Yet Hispanics own less than one percent of the nation's broadcast stations. They own only .4% of the nation's FM stations, and only .6% of the television stations. NTIA, U.S. Department of Commerce, October, 1993.

These figures are a serious problem for the nation as a whole. Broadcasting remains the most important medium for distribution of information. It is particularly important for Hispanics, who may lack the means to subscribe to cable, and some of whom lack language skills to make use of English language newspapers. But Hispanics' ability to make use of the broadcast system is seriously impeded by the near absence of Hispanic ownership. Non-Hispanic owners lack a full understanding of the special needs, especially the language needs, of Hispanics. Consequently, Hispanics' access to economic information conveyed in the broadcast medium is significantly less than access for whites. This reduced access impairs Hispanics' ability to participate in the nation's economy. And that reduces the economic welfare not only of Hispanics, but of all Americans.

Grant of new construction permits in comparative hearings remains a vitally important means to increase Hispanic broadcast ownership. The only other option, purchase of existing stations, is prohibitively expensive for all but a few Hispanics. New stations, in contrast, can be constructed at relatively modest cost. Almost all existing stations at one time or another were originally granted to whites, who then invested no more than the cost of construction. The time has come to make sure that

Hispanics receive a similar opportunity.

Consistent with these general observations, LULAC joins the other civil rights groups in calling for a stronger comparative preference for minority ownership. Raising the present abysmal percentage of minority broadcast ownership, LULAC believes, should be the Commission's most urgent public interest priority. No other comparative criterion can have can have as significant an impact upon the public interest as raising this percentage. Thus, the preference for minority ownership should be given greater weight than any other preference.

Unlike every other preference in the Commission's present system, moreover, the minority ownership preference cannot be attacked by the D.C. Circuit. The minority preference was specifically upheld by the U.S. Supreme Court in Metro Broadcasting, Inc, v. FCC, 497 U.S. 547 (1990). The D.C. Circuit cannot overrule the Supreme Court. Even if the circuit court were disposed to try to abolish every other preference, it could not assault the minority ownership preference.

Concerning the minority preference, LULAC agrees with the civil rights groups on two other points. First, the preference should be uncoupled from the integration criterion. Minority ownership can contribute significant public interest benefits even if the owners do not work at their stations. Those owners still have strong incentives to ensure that their stations operate according to their standards. Second, any license granted on the basis of a minority preference, or any other comparative

criteria, should be held by the persons for whom the preference is granted for at least three years. The public interest is not served if the Commission grants a license to a minority owner, who then quickly sells the station to whites. The object is to increase minority ownership, an object that will be met only if a reasonable holding period is imposed.

LULAC also agrees with the civil rights groups that the Commission should retain a preference for integration of ownership and management. Such a preference has been granted by the Commission from the very beginning of comparative hearings. And when the Commission first began to grant the preference, it was very close to the broadcast industry. It knew then, as it should know today, that owners who work at their stations are more involved in the station's activities, and more acutely aware of what the station can do to assist the community. This preference should be granted on a "stand-alone" basis. The current "enhancement" criteria should be applied as independent preferences. And again, as with all criteria, any licensee who promises integration and then receives a license based in part on that promise should be required to adhere to the promise for at least three years.

Despite its general agreement with the civil rights groups, however, LULAC does have a few differences. Most importantly, LULAC believes that the FCC should not grant any significant preference for broadcast or business experience. Nor should the integration preference be tied, as the civil rights

groups suggest, to such experience.

Any preference based on broadcast or business experience favors those persons who have had an opportunity to gain such experience. Hispanics have long been denied an equal opportunity to gain that experience. This has happened because of outright discrimination, the language barrier and lesser economic status. These problems are not the fault of the Hispanics who have been denied equal opportunity. They are systemic problems within our society. Any preference that works against Hispanics because of these problems will not only be unfair, but will compound the problems, rather than assisting in their solution. The FCC would commit a grievous error, LULAC believes, if it created such a preference.

Any significant preference for experience would, moreover, lack a rational basis. As the Commission has long recognized, experience can quickly be gained. The first broadcasters had no experience. They learned broadcasting on the job. They were, we assume, white. Hispanics should not now be disfavored when they can learn broadcasting the same way.

LULAC also differs with the civil rights groups as to whether a preference should be granted for civic participation in communities outside the service areas of proposed stations. We do agree that a separate preference, uncoupled from local residence, should be granted. Civic participation yields insights into community problems that local residence alone does not. But we do not believe that civic participation in areas outside proposed

service areas has the same effect. Comparative preferences should not be merit badges for good behavior. They should seek to improve broadcast service to the communities being served by the new stations.

Civic participation is valuable in that respect only if it took place in the areas to be served by the stations. Suppose, for example, that a new station is proposed for El Paso. One applicant has worked to improve the Mexican-American barrios in El Paso. The other has raised funds for the Junior League in Boston. The Commission cannot reasonably hold that both applicants are equally prepared to promote the public interest by broadcasting in El Paso. Only civic participation in the El Paso area should count for this purpose.

Finally, LULAC differs slightly with the civil rights groups in its interpretation of the D.C. Circuit's decision in Bechtel v. FCC, 10 F.3d 875 (1993). The underlying basis for that decision was this fact: The FCC's comparative criteria were adopted in a policy statement, not in a rulemaking proceeding. Because the policy statement was applied in adjudication, the criteria in Bechtel were reviewed under the substantial evidence test set out in the Administrative Procedure Act for review of adjudicatory decisions. 5 U.S.C. § 706(E). The court explicitly points this out, and relies upon that standard of review. Under the substantial evidence test, there is no doubt, almost any comparative criterion would be difficult to justify.

The Commission is, however, now holding a rulemaking proceeding to determine its future comparative criteria. The standard of review for decisions in rulemaking is far more tolerant. The D.C. Circuit can reverse such a decision only if the result is arbitrary or capricious. 5 U.S.C. 706(A). A rulemaking decision passes this test, the Supreme Court holds, as long as the agency examines the relevant data and articulates a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983).

Far from requiring substantial evidence, this standard requires no "evidence" at all. The Supreme Court has repeatedly held that rulemaking decisions may "rest on judgment and experience rather than pure factual determinations." FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981). In circumstances of the kind involved here, "compete factual support in the record for the Commission's judgment or prediction is not possible or required; a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 814 (1978).

Here, the Commission has employed an integration criterion from the very beginning of broadcast comparative hearings. Experience has taught it that ownership participation in station management yields benefits in the public interest.

That is precisely the kind of determination the Commission is entitled to make in rulemaking based only on experience and expert judgment. And if the D.C. Circuit were to hold otherwise, the Supreme Court would reverse it.

The Commission should, as we have indicated, require that all comparative promises be adhered to for at least three years. In that respect, the D.C. Circuit's complaints are valid even in a rulemaking context, because the FCC is fundamentally irrational to grant preferences on the basis of promises that need not be kept. Apart from that adjustment, however, the Commission should not cower in some corner out of fear of the D.C. Circuit. The Commission is entitled to make its own legitimate policy judgments; the D.C. Circuit is not entitled to second guess those judgments.

Respectfully submitted

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